

The stipulations as specifically set forth by the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant sustained an accidental injury arising out of and in the course of his employment from February 4 through February 18, 1991.
- (2) What is claimant's average weekly wage?
- (3) What is the nature and extent of claimant's disability, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed with the Division of Workers Compensation and in the addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The claimant sustained an injury to his low back from February 4 through February 18, 1991, while employed for the respondent as a manual laborer. As a result of these injuries suffered while so employed, claimant is permanently and totally disabled.

Claimant, a manual laborer for Butler County Highway Department, regularly lifted over twenty (20) pounds and, in his job, was required to bend, twist, push, and pull on a regular basis. Claimant had a long history of back problems beginning in 1982 when he underwent a back fusion. He was released to return to work with no restrictions after the fusion but encountered additional problems in 1987 at which time he was returned to work with specific restrictions. The evidence indicates the respondent, Butler County Highway Department, did not follow the restrictions provided from Dr. Overholser, the treating physician in 1987, and claimant was required to continue performing heavy manual labor.

During the period of February 4 through February 18, 1991, claimant began experiencing severe back pain and felt and heard popping noises in his back while bending, stooping, twisting, pushing, pulling, and lifting on a regular basis. The jobs which the claimant regularly performed required that he pick up materials out of ditches and off of highways, repair potholes, shovel and sweep materials, and periodically cut and haul brush and other trash from on and around highways.

Claimant continued working through April 13, 1991, after which he was no longer able to perform his job duties.

Subsequent to the cessation of his employment, claimant underwent a vocational rehabilitation evaluation and a plan was submitted. The plan was rejected by the vocational rehabilitation administrative finding claimant was not capable of physical labor and his extreme lack of education coupled with his low intelligence would not make him a candidate for retraining.

At the time of the regular hearing, claimant reported being in constant pain, experiencing popping and crunching in his back on a regular basis. He was restricted from long periods of standing or sitting, had difficulty sleeping, wore a back brace most of the time, would develop numbness in his legs if he sat for too long, and had difficulty getting in and out of cars due to the pain in his back. In May or June 1992, while sitting in his backyard, claimant began developing numbness in his lower extremities. When he attempted to rise and walk he lost his balance and started to fall. He reached out to grab

a tree limb, which broke causing him to fall backwards striking his shoulder on the tree trunk. Subsequent to that injury, he has been unable to use his arm above shoulder level and had difficulty extending the arm from the side of his body at ninety degrees.

Claimant was examined by Dr. Ernest Schlachter on July 31, 1991. Dr. Schlachter found claimant's range of motion to be limited in all directions. Claimant walked with a limp, had difficulty in heel and toe walking and all movements appeared to be protected and guarded. X-ray's, myelogram, and CT scan showed evidence of narrowing at L5-S1 without evidence of herniation. Dr. Schlachter rated claimant at a thirty percent (30%) whole body impairment on a functional basis and restricted him from repetitive lifting of over ten (10) pounds, with no single lift over twenty (20) pounds, no repeat bending, twisting, or working in awkward positions. Dr. Schlachter also opined claimant needed to sit part-time and stand part-time on the job and, with his limited educational skills, would find reemployment or retraining very difficult.

Claimant was examined and treated by Dr. Richard Kuhns of El Dorado, Kansas, from February 19, 1991 through July 20, 1992. Dr. Kuhns felt claimant had a chronic low back condition and felt that the heavy manual labor claimant was performing prior to his injury was inappropriate. He felt claimant could return to work but he needed to do a non-manual type of job and should avoid prolonged sitting and standing. Dr. Kuhns also restricted claimant from lifting over twenty (20) pounds with no bending at the waist. Dr. Kuhns did examine claimant's shoulder subsequent to the June 1992 injury and diagnosed a rotator cuff tear. He was referred to Dr. Siwek for ongoing treatment of the shoulder problem which also involved posttraumatic capsulitis. Dr. Kuhns provided no permanent impairment ratings as he does not regularly provide same as part of his practice.

Claimant was examined by Duane A. Murphy, M.D. after referral from Dr. Kuhns for the low back pain. Dr. Murphy diagnosed a failed back, meaning claimant had undergone back surgery with continued complaints of pain after the surgery. He recommended an x-ray, myelogram and CT scan which showed hypertrophy or enlargement of the ligaments at L5-S1. He also restricted claimant from lifting over twenty (20) pounds, and advised no prolonged standing or walking and no excessive bending or twisting at the waist. He further restricted claimant from prolonged sitting. Unless claimant showed improvement, the doctor did not anticipate modifying these restrictions. He opined claimant's functional impairment would be in the range of ten to fifteen percent (10-15%) after a fusion if he remained symptomatic.

Claimant was evaluated by Donald E. Vander Vegt on August 15, 1991. Mr. Vander Vegt assessed claimant's ability to perform work in the open labor market to have been reduced by eighty-seven percent (87%) as a result of his injuries. Even though Mr. Vander Vegt assessed an eighty-seven percent (87%) loss of ability to perform work in the open labor market, he felt Mr. Sharp's chance of actually obtaining employment to be non-existent or zero. He also opined that claimant's ability to earn comparable wages had been reduced by one-hundred percent (100%) as claimant was currently unemployed. He felt claimant would be capable of earning less than minimum wage with his hope for future employment requiring some type of sheltered employment situation such as Good Will. On cross examination, Mr. Vander Vegt agreed that claimant, whom he had opined was capable of working in sixteen percent (16%) of the pre-injury jobs, would, in reality, have available to him only eight percent (8%) of the jobs as a result of his low IQ. When taking into consideration claimant's lack of education and intelligence, Mr. Vander Vegt felt claimant, post-injury, would be capable of performing somewhere in the range of .2% or

.3% of the labor market jobs available. This would even more significantly reduce claimant's ability to obtain work in the open labor market but would have no effect on his ability to earn a comparable wage. Mr. Vander Vegt felt that there were so few jobs available to this man they would be insignificant and the claimant was incapable of obtaining any type of substantial gainful employment.

The claimant, in a workers compensation matter, has the burden of proof to establish his right to an award of compensation by proving the various conditions on which his right to a recovery depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

"Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts."

A person is considered permanently and totally disabled when a person is completely and permanently unable to engage in any type of substantial and gainful employment. Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984).

"The test of being completely and permanently unable to engage in any type of substantial and gainful employment determines when disability is *total*....". Grounds v. Triple J Constr. Co., 4 Kan. App. 2d 325, 606 P.2d 484 (1980).

A finding that a claimant is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent. Wardlow v. ANR Freight Systems, Inc., 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

Upon review of the entire evidentiary record, the Appeals Board finds claimant is permanently and totally disabled as a result of the injuries suffered out of and in the course of his employment with Butler County from the period February 4, 1991 through February 18, 1991.

The Appeals Board, in awarding claimant permanent and total disability, bases the same upon an average weekly wage of \$587.16 which includes the value of fringe benefits computed into claimant's wage package.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated January 14, 1994, is hereby affirmed and an award is granted in favor of the claimant, David C. Sharp, and against the respondent, Butler County and Employers Mutual Casualty Insurance Company and the Kansas Workers Compensation Fund.

Claimant is entitled to 50.71 weeks of temporary total compensation at the rate of \$278.00 per week totalling \$14,097.38 followed thereafter by 398.93 weeks permanent total disability at the rate of \$278.00 per week totalling \$110,902.62 for a grand total of \$125,000.00.

As of July 15, 1994, claimant is entitled to 50.71 weeks of temporary total disability compensation at the rate of \$278.00 per week totalling \$14,097.38 plus 127 weeks permanent total disability at the rate of \$278.00 equalling \$35,306.00 for a total of \$49,403.38 due and owing in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of \$75,596.62 shall be paid at the rate of \$278.00 per week until fully paid or until further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved subject to the statutory limitations set forth therein.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 25% against the respondent and 75% against the Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates	
Transcript of Preliminary Hearing	\$133.00
Transcript of Preliminary Hearing	79.60
Total	\$212.60
Deposition Services	
Transcript of Preliminary Hearing	\$244.80
Transcript of Regular Hearing	250.60
Total	\$495.40
Don K. Smith & Associates	
Deposition of Ernest Schlachter, M.D.	\$234.75
Deposition of H. Richard Kuhns, M.D.	383.25
Total	\$618.00
Ireland Court Reporting	
Deposition of Duane A. Murphy, M.D.	\$263.00
Jay E. Suddreth & Associates	
Deposition of Don E. Vander Vegt	Unknown

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

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